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Nos. 85-5221 and 85-5731

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RANDALL LAMONT GRIFFITH,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

WILLIE DAVIS BROWN,

Petitioner,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY IN NO. 85-5221 AND TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT IN NO. 85-5731

BRIEF OF THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., AND THE AMERICAN JEWISH CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

What should be the extent of the retroactive application given the decision in Batson v. Kentucky, 476 U.S. ___, 90 L.Ed.2d 69 (1986)?

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INTEREST OF AMICI*

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation

* Letters from the parties consenting to the filing of this brief have been lodged with the Clerk of the Court.

organized under the laws of the State of New York in 1939. It was formed to assist blacks to secure their constitutional rights through the prosecution of lawsuits. Under its charter, the Fund renders legal aid to impoverished blacks suffering injustice by reason of race. For many years, its attorneys have represented parties and participated as amicus curiae before this Court and in the lower state and federal courts.

The Fund has a long-standing concern with the exclusion of blacks from jury service and the impact of that practice on the criminal justice system. It has raised jury discrimination claims in appeals from criminal convictions, see, e.g., Swain v. Alabama, 380 U.S. 202 (1965); Alexander v. Louisiana, 405 U.S. 625 (1972), and currently represents clients who have been affected by this practice. See, e.g., Gordon v. United States, No. 85-7726 (11th

Cir.)(pending); Evans v. Mississippi, No. 85-6932, cert. denied, 54 U.S.L.W. 3810 (June 9, 1986).

The American Jewish Congress is a national organization of American Jews founded in 1918. It is concerned with the preservation of the security and constitutional rights of all Americans. Since its creation, it has vigorously opposed racial and religious discrimination in all areas of American life, including the administration of justice.

SUMMARY OF ARGUMENT

At the least, decision in the two cases before the Court should follow from the Court's recent retroactivity decisions, see, e.g., Shea v. Louisiana, 470 U.S. ___, 84 L.Ed.2d 38 (1985); United States v. Johnson, 457 U.S. 537 (1982), which apply new constitutional decisions to all similarly situated cases still pending on direct appeal. This approach is strongly recommended by three considerations: (1) it promotes predictability in constitutional adjudication; (2) it strikes a reasonable balance between the concerns of equity and stability; and (3) it is rooted in judicial practice with a pedigree nearly as old as the Republic itself. See United States v. The Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801).

Amici write separately, however, to put before the Court their views concerning the broader reach of the decision last Term in

Batson v. Kentucky, 476 U.S. ___, 90 L. Ed.2d 69 (1986). The inclusion of blacks and other minorities on criminal juries is important not merely for the social values of participation, legitimacy, and nondiscrimination. A proper understanding of what juries do and how they do it leads inevitably to the conclusion that the exclusion of blacks has a direct and demonstrable impact on the actual outcomes of jury verdicts -- that is, on the truth-finding process. Thus, full retrospective application is called for.

The rule announced in Batson is not, in its own terms, a "clear break" with past law. The exclusion of potential jurors solely on the basis of their race is and was a grave constitutional wrong in which no conscientious prosecutor should have indulged -- Swain v. Alabama, 380 U.S. 202 (1965), notwithstanding. Accordingly, the good faith reliance by prosecutors on past

precedent does not weigh in favor of limited application of the decision in Batson.

Because of the nature of the sentencing decision in capital cases, involving as it does the application of value judgments to a highly discretionary decision, the exclusion of blacks and other minorities has a heightened impact on the decision-making process in those cases. Accordingly, Batson should be fully retroactive to all challenges to death sentences imposed or recommended by juries from which blacks were improperly excluded.

ARGUMENT

I. BECAUSE THE EXCLUSION OF BLACKS AND OTHER MINORITIES HAS A DIRECT IMPACT ON A JURY'S DECISION-MAKING THAT RAISES SERIOUS QUESTIONS ABOUT THE ACCURACY OF THE RESULTING VERDICT, AND BECAUSE PROSECUTORS' INVOCATION OF THE PRACTICE WAS NOT IN GOOD FAITH, THE RULE OF BATSON v. KENTUCKY SHOULD BE RETROACTIVE

"[R]esolution of the question of retroactivity [i]s not automatic[]...." Brown v. Louisiana, 447 U.S. 323, 327 (1980)(plurality opinion). "Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice...." Linkletter v. Walker, 381 U.S. 618, 728 (1965). Nevertheless, amici respectfully submit that the Court should at least follow its recent practice of holding new constitutional decisions retroactive to cases not yet final. See, e.g., Shea v. Louisiana, 470 U.S. ___, 84 L.Ed.2d 38

(1985); United States v. Johnson, 457 U.S. 537 (1982); Brown v. Louisiana, supra.

Adherence to this practice serves several important values. First, it provides predictability in constitutional adjudication, avoiding the appearance of inconsistency and unfairness that results from the changing contours of retroactivity doctrine. See United States v. Johnson, 457 U.S. at 547; Mackey v. United States, 401 U.S. 667, 677 (1971) (Harlan, J., dissenting). Second, it strikes a reasonable balance between the concerns of stability in the law, on one hand, and equity, on the other. See United States v. Johnson, 457 U.S. at 555-56.

Third, it promotes the legitimacy of the constitutional decision-making process;[1] full prospectivity creates the

[1] A contrary approach would undermine constitutional adjudication in another way not explored in the text. Without some incentive for litigants to raise an issue that previously had been rejected by the

appearance of the judiciary "fishing one case out of the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule...." Mackey, 401 U.S. at 678-79 (Harlan, J., dissenting). Finally, it is consonant with "basic judicial

courts, outmoded, incorrect, or inefficient rules never would be challenged. Without some incentive, it would always be too "costly," -- the issue would be displaced in the litigant's brief by other issues more likely to succeed or, at least, more likely to command the attention of an appellate court. See Jones v. Barnes, 463 U.S. 745 (1983).

Obviously, the incentive that motivates litigants to challenge such rules is the possibility of victory on appeal. A pure prospectivity rule diminishes severely that incentive by limiting to a universe of one the number of litigants who possibly may benefit from a rule change. The predictable result is a dearth of necessary challenges to outmoded doctrines and the potential ossification of the law. See Priest & Klein, The Selection of Disputes for Litigation, 13 J. Legal Stud. 1 (1984); Priest, The Common Law Process and the Selection of Efficient Rules, 6 J. Legal Stud. 65 (1977).

tradition...." Desist v. United States, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting); see United States v. The Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801).

It is our position, however, that the decision in Batson should be accorded full retroactive effect under the standards developed in Linkletter and its progeny.[2] In the sections that follow, we discuss the tripartite standard governing retroactivity articulated in Stovall v. Denno, 388 U.S. 293, 297 (1967),[3] as interpreted in subsequent cases.

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[2] Because the Court now has the benefit of full briefing and argument on this issue, it would be appropriate to reconsider its contrary decision in Allen v. Hardy, ___ U.S. ___, No. 85-6593 (June 30, 1986).

[3] The Stovall Court expressed the considerations as follows: "(a) the purpose to be served by the new standard; (b) the extent of reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." Id. at 297.

A. The Exclusion of Blacks from Criminal Juries Affects in Fundamental Ways the Accuracy and Reliability of the Decision-making Process

The use of peremptory challenges to remove potential jurors on the basis of their race violates core constitutional values concerning equal protection and public participation in the criminal justice system; it undermines as well public confidence in the legitimacy and fairness of that system. But it does not follow that these are the primary values implicated by this unconstitutional practice.

Common sense suggests that the rule of Batson is neither a mere prophylactic--like those at issue in Johnson v. New Jersey, 384 U.S. 719 (1966), and Shea v. Louisiana -- nor a product solely of policy concerns extrinsic to the accuracy and reliability of the trial process--like those at issue in Linkletter and

United States v. Johnson. Rather, like the rule against coerced confessions, it serves "a complex of values," Blackburn v. Alabama, 361 U.S. 199, 207 (1960), some of which bear heavily on the truth-finding process and, therefore, mandate retroactive effect. Linkletter, 381 U.S. at 638; see, e.g., Arsenault v. Massachusetts, 393 U.S. 5 (1968).

This is clear when one considers the nature of the practice that Batson condemned. Prosecutors who used their peremptory challenges to strike black potential jurors did so not primarily out of blind racial animus; they did so because they believed that it affected the outcomes of their cases. Thus, one prosecutor testified about his former practice and the reasons for his change:

> So we made a determination that we were not going to in any way discriminate against blacks; we were going to try to keep black jurors..., and the longer we tried that, the more discouraged we got about it.... We just had to abandon

> that philosophy. * * * And the defense attorneys can tell you very well when that happened, because it's when they started losing more cases.

Edwards v. Thigpen, Civil Action No. J 83-0566(B)(S.D. Miss.), Deposition of Edward J. Peters at 31, 34 (April 12, 1985).

All jurors are not fungible; the deliberate exclusion of minorities from criminal juries has a direct and demonstrable effect on the actual outcomes of criminal cases. The reasons are readily apparent when one considers both what a jury does and how it does it.

It is simplistic to view the jury solely as the finder of "facts" subject to measurement by some objective standard of "truth" or "falsity." Hardly any criminal case is so one-dimensional. Nor is the jury's judgment limited to the binary alternatives of "guilt" or "innocence." "[T]he jury plays a political function in the administration of the law...." Taylor v. Louisiana, 419 U.S. 522, 529 (1975). "It

must be remembered that the jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it." Id. at 26 n. 37 (quoting H.R. Rep. No. 1076, 90th Cong., 2d Sess., reprinted in 1968 U.S. CODE CONG. AND AD. NEWS 1792, 1797, the House Report on the Federal Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861 et seq.).[4]

The jury functions in part by invoking its values to express the community's judgment of the severity of the offense and the moral culpability of the offender. Cf. Vasquez v. Hillery, 474 U.S. ___, 88 L.Ed.2d 598, 608-09 (1986)(grand jury). It

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[4] As Justice Rehnquist has observed: "Trial by a jury of laymen rather than by the sovereign's judges was important to the founders because juries represent the layman's common sense, the 'passionate elements in our nature,' and thus keep the administration of law in accord with the wishes and feelings of the community." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 341-42 (1979)(Rehnquist, J., dissenting) (quoting O. Holmes, COLLECTED LEGAL PAPERS 237 (1920)).

may do so in obvious ways, as when it chooses between guilt of the crime charged or of a lesser included offense. See Keeble v. United States, 412 U.S. 205 (1973). Or it may do so in less obvious ways when it treats the variety of factual and mixed factual-legal decisions with which it is regularly confronted.

This becomes clear when one considers the multi-dimensional nature of even a simple criminal case. For example,

> [i]magine a manslaughter charge arising out of reckless driving. The decision-maker must determine the truth of a certain number of propositions regarding "external facts," such as the speed of the automobile, the condition of the road, the traffic signals, the driver's identity, and so on. ... The inquiry here appears to be relatively objective, and the truth about such facts does not seem to be too elusive.
>
> But many "internal facts" will also have to be established.... They regard aspects of the defendant's knowledge and volition.... The ascertainment of such facts is already a far less objective undertaking than the ascertainment of facts derived by the senses....

> The situation changes, however, when the facts ascertained must be assessed in the light of the legal standard. Whether a driver has deviated from certain standards of care -- and if so to what degree -- are problems calling for a different type of mental operation than that used in dealing with external facts.

Damaska, Presentation of Evidence and Fact-finding Precision, 123 U.Pa.L.Rev. 1083, 1085-86 (1975). The impact on the decision-making process of the exclusion of minorities must be understood at each level of the truth-finding process.

The exclusion of minority jurors will inevitably result in the exclusion of perspectives and values not otherwise represented. This will have obvious impact on the qualitative decisions regarding intent and the application of legal standards to the facts of the case. But even at the first, most objective level -- that of "external facts" -- the exclusion of minorities will have a skewing effect on

the accuracy of factfinding in several distinct ways.[5]

A jury is often called upon to ascertain facts on the basis of the credibility of the witnesses. In a case involving a black defendant -- or, as in Griffith, a black defendant and white victims -- the array of witnesses will often divide on racial lines. In assessing their credibility on the basis of their demeanor, for example, it matters a great deal if there are blacks on the jury who are accustomed to the habits of speech and mode of presentation exhibited by the

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[5] One study found that, when showed a picture of a white person armed with a razor apparently arguing with a black man, over half of the subjects reported that it was the black man who held the razor. G. Allport & L. Postman, THE PSYCHOLOGY OF RUMOR 111 (1965), discussed in Johnson, Black Innocence and the White Jury, 83 Mich. L. Rev. 1611, 1645 (1985).

defendant that might be unfamiliar or even threatening to white jurors.[6]

The perception of primary, "external facts" is also affected by the values brought to the jury room. The Court recognized as much in Adams v. Texas, 448 U.S. 38 (1980) -- where the value at issue was the jurors' scruples against the death penalty. There, the Court acknowledged that the jurors' values "may affect what their honest judgment of the facts will be or what they may deem to be a reasonable

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[6] See Peters v. Kiff, 407 U.S. 493 (1972)(plurality opinion):

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude ... that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

Id. at 503-04.

doubt. Such assessments and judgments by jurors are inherent in the jury system. ..." Id. at 50.

This conclusion, of course, has strong empirical foundations in the work of Professors Kalven and Zeisel, H. Kalven, Jr., & H. Zeisel, THE AMERICAN JURY (1966). In their study of judge-jury disagreements, they found that

> to a considerable extent, or in exactly 45 per cent of the cases, the jury in disagreeing with the judge is neither simply deciding a question of fact nor simply yielding to a sentiment or values; it is doing both. It is giving expression to values and sentiments under the guise of answering questions of facts.

Kalven & Zeisel, supra, at 116.[7]

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[7] Thus, what may look apparent to a reviewing court may have seemed very different to the jurors who heard all the testimony and wrestled with the facts in light of community values. "[T]he more one is removed from the fullness of life, the more limited but also the more precise is our knowledge: there is one fixed perspective. On the other hand, the closer one remains to the complexity of real life processes, the more encompassing but also the less certain is one's understanding: as in cubism, our sensations come from

Moreover, the very nature of the reasonable doubt standard means not only that the jury will necessarily call upon its values, but also that an individual juror will make a difference. Kalven and Zeisel found that juries by and large have a higher threshhold of reasonable doubt than do judges, but they did not ascribe that difference to any "distinctive value[s] held by laymen." Kalven & Zeisel, supra, at 189 n. 5. Rather, they concluded that if a jury "decides close cases with a higher cut-off point than does a single judge, the explanation may reside in the unanimity requirement. The jury, to avoid disagreement, would tend in the direction of its most stringent member." Id. Thus, the exclusion of a single minority juror who holds a more stringent view of "what [he] may deem to be a reasonable doubt...,"

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multiple viewpoints and there is more than one side to every story." Damaska, supra, at 1104.

Adams v. Texas, 448 U.S. at 50, will have a profound impact on the jury's decision-making process. This affects the truth-finding process in a manner so vital as to command retroactive application. See Hankerson v. North Carolina, 432 U.S. 233 (1977); Ivan V. v. City of New York, 407 U.S. 203 (1972).

The improper exclusion of even a single minority juror will have an actual impact on the outcome of the jury verdict in other empirically demonstrable ways. For example, Kalven and Zeisel found that the incidence of hung juries depends on the number of dissenting jurors: "for one or two jurors to hold out to the end, it would appear necessary that they had companionship at the beginning of the deliberations. ... To maintain his original position, not only before others but even before himself, it is necessary for him to have at least one ally." Kalven & Zeisel, supra, at 463.

Thus, the use of peremptory challenges to exclude a single minority juror could literally spell the difference between conviction, on one hand, or a hung jury resulting ultimately in acquittal, on the other. See Brown v. Louisiana, 447 U.S. at 332 & n. 10.

The Court need not speculate on this matter, for the records in each of the cases before it provide eloquent demonstrations of the impact of this practice on actual juries. In Brown, the Assistant United States Attorney testified that the reason he used his peremptories to strike blacks was that a previous case in which he did not do so ended in a hung jury. Appendix D to the Petition for Certiorari in No. 85-5731, at 20.

Griffith provides an even more compelling example. There, the key issue was a questionable cross-racial

identification.[8] Mr. Griffith was tried twice. He was convicted by a jury from which blacks were purged by the prosecutor's use of peremptory challenges. But the first trial, at which the prosecutor struck only three of the four blacks on the venire, ended in a hung jury.

The exclusion of a single minority juror can have an actual impact on the ultimate verdict in another way. Kalven and Zeisel found "that with very few exceptions the first ballot decides the outcome of the verdict." Kalven & Zeisel, supra, at 488 (emphasis in original). The effect of the initial vote was quite precise, and revealing: an initial vote of 7-5 to convict resulted in a verdict of "guilty" 86% of the time; an initial vote of 7-5 to acquit resulted in a verdict of "innocent"

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[8] Mr. Griffith testified and denied guilt. One of the white victims, who positively identified him as the assailant, also testified that she saw him on the street two weeks after the crime -- at a time when Mr. Griffith was in jail awaiting trial.

91% of the time; and an initial vote of 6-6 made the ultimate result a toss-up: "the final verdict falls half the time (it so happens, exactly half the time) in one direction and half in the other." Id. The impermissible purging of a single minority juror can shift the balance on the initial vote in a way that in fact determines the outcome.

"Thus, it makes a good deal of difference in this decision-making who the personnel are." Kalven & Zeisel, supra, at 496; see also Ballard v. United States, 329 U.S. 187, 194-95 (1946). Indeed, the identity of the jurors is more important to the outcome than the deliberation process. Kalven & Zeisel, supra, at 496. Thus, the fact that the remaining jurors may themselves be fair and impartial "does nothing to allay our concern about the reliability and accuracy of the jury's verdict." Brown v. Louisiana, 447 U.S. at

333. "Any practice that threatens the jury's ability to perform that function poses a similar threat to the truth-determining process itself. The rule in [Batson] was directed toward elimination of just such a practice. Its purpose, therefore, clearly requires retroactive application." Id. at 334.[9]

B. The Reliance by Prosecutors on Swain Does Not Support Prospective Application of the Standards Enunciated in Batson

Batson was not the kind of "clear break" with past precedent that would warrant prospective application. First, Batson did not purport to change the substantive standard governing the use of peremptory challenges by prosecutors. To

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[9] DeStefano v. Woods, 392 U.S. 631 (1968), is not to the contrary. It is one thing to say that a judge's determinations are no less accurate and reliable than a jury's. But it is quite another to provide a jury and then ignore the fact that it has been tampered with in ways affecting directly its decision-making function. See Brown, 447 U.S. at 334 n. 13.

the contrary, it began its analysis with the observation that "Swain ... recognized that a 'State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause.'" Batson, 90 L.Ed.2d at 79 (quoting Swain v. Alabama, 380 U.S. at 203-04).

Although Batson did of course overrule Swain in part, it did so only with regard to the mode of proof to be employed in proving discriminatory use of the peremptory challenge. If prosecutors relied on the Swain standards, they relied on those standards not to justify their conduct but merely to insulate their knowingly impermissible conduct from effective review. This is not the kind of "good-faith reliance," Brown v. Louisiana, 447 U.S. at 335; DeStefano v. Woods, 392 U.S. 631, 634 (1968), that justifies

eternal insulation by means of a prospectivity rule.[10]

> No prosecutor could have been unaware
>
> that racial discrimination ... violates deeply and widely accepted views of elementary justice.... Over the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination....

Bob Jones University v. United States, 461 U.S. 574, 592-93 (1983). Thus, in every case in which the defendant, pursuant to Batson, makes a prima facie case that the prosecutor used peremptory challenges to eliminate blacks for impermissible motives, it is necessarily true that there is reason to believe that the prosecutor knowingly

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[10] Certainly, no prosecutor who tried a case subsequent to the decisions respecting the denial of certiorari in McCray v. New York, 461 U.S. 961, 963 (1983)(Marshall and Brennan, JJ., dissenting from the denial of certiorari); id. at 961 (Stevens, Blackmun, and Powell, JJ., opinion respecting the denial of certiorari), could fail to be on notice that the practice was constitutionally suspect.

committed "a grave constitutional trespass." Vasquez v. Hillery, 88 L.Ed.2d at 608.

Second, even Batson's change in the evidentiary standard was not a "clear break" with past law. The Court's review in Batson of its intervening decisions regarding proof of impermissible racial motive conclusively demonstrates that Batson was foreshadowed in a host of cases. Where Swain had indicated that "an inference of purposeful discrimination would be raised on evidence that a prosecutor, 'in case after case, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes...,'" Batson, 90 L.Ed.2d at 84 (quoting Swain, 380 U.S. at 223), Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), had made clear

> that "a consistent pattern of official racial discrimination" is not "a necessary predicate to a violation of the Equal Protection Clause. A single invidiously discriminatory governmental act" is not "immunized by the absence of such discrimination in the making of other comparable decisions."

Batson, 90 L.Ed.2d at 87 (quoting Arlington Heights, 429 U.S. at 266, n. 14); see also Alexander v. Louisiana, 405 U.S. at 629-31.

Moreover, "[t]he standards for assessing a prima facie case in the context of discriminatory selection of the venire have been fully articulated since Swain." Batson, 90 L.Ed.2d at 87. It was "[t]hese principles" -- spelled out in the Court's cases from 1972 onward[11] -- which supported the "conclusion that a defendant may establish a prima facie case of

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[11] The Court cited and discussed Alexander v. Louisiana, 405 U.S. 625, 629-31 (1972); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)(Title VII); Washington v. Davis, 426 U.S. 229, 241-42 (1976); and Castaneda v. Partida, 430 U.S. 482, 494-95 (1977), as articulating the evidentiary standards to be applied. Batson, 90 L.Ed.2d at 87-88.

purposeful discrimination in selection of the petit jury solely on the evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial." Id.

C. The Potential Effect on the Administration of Justice is not so Overwhelming as to Override the Foregoing Factors

The balance of considerations raised by the concern for the effect of Batson on the administration of justice is not so overwhelming as to override the concern for accuracy in the jury's decision-making process.

First, it is not clear that this factor points only in the direction of prospectivity. There are cases that raise the issue of discriminatory use of peremptories on records that meet the standards of either Batson or Swain. See, e.g., Evans v. Mississippi, No. 85-6932, cert. denied, 54 U.S.L.W. 3810 (June 9, 1986). Indeed, Brown may well be just such

a case.[12] It would be not only anamolous but wasteful to require the lower courts to hear such petitioners present the "case after case" evidence required by Swain when their claims might be proved more efficiently under the Batson standards.

Second, it is not at all clear that the number of Batson claims that properly were preserved in the state courts is so high that a general jail delivery is to be feared. See Wainwright v. Sykes, 433 U.S. 72 (1977); Hankerson v. North Carolina, 432 U.S. at 244 n. 8. For those who did not perserve the claim, it is unlikely that

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[12] In his concurring opinion in Batson, Justice White explained that even under Swain it would be proper for a trial judge to invalidate the prosecutor's use of peremptories in a case in which he or she admitted to doing so on the basis of race, especially if the defendant is black. Batson, 90 L.Ed.2d at 90 n. *. In Brown, the Assistant United States Attorney ultimately admitted to the trial judge that: "I said 'We would like to have as few black jurors as possible,' which is exactly either I'm sure what I said or close to it...." Appendix D to the Petition for Certiorari in No. 85-5731, at 70.

they will be able to show cause; the very cases that warned prosecutors of the illegality of the practice also provided the tools for competent counsel to raise and preserve the claim. See Engle v. Isaac, 456 U.S. 107 (1982). Moreover, the lower courts may properly limit consideration to only those cases in which there is an adequate proffer of evidence to suggest a prima facie case. See. e.g., Esquivel v. McCotter, 791 F.2d 350, 351 (5th Cir. 1986) (state court found that no Spanish-surnamed jurors were struck).

In any event, the Court has never held that a practice which strongly implicates the truth-finding process will nevertheless be given retroactive condonation simply because of the the widespread nature of the violation. See Hankerson v. North Carolina, 432 U.S. at 243.

II. THE NATURE OF THE SENTENCING DECISION IN CAPITAL CASES IS SUCH THAT THE EXCLUSION OF MINORITIES FROM THE JURY NECESSARILY DIMINISHES ITS RELIABILITY, REQUIRING RETROACTIVE APPLICATION OF BATSON TO CAPITAL SENTENCING PROCEEDINGS

The nature of the capital sentencing decision made by a jury calls for the retroactive application of Batson because of the "unacceptable risk ... infecting the capital sentencing proceeding...," Turner v. Murrray, 476 U.S. ___, 90 L.Ed.2d 27, 37 (1986) (emphasis in original), that results from the exclusion of minorities from sentencing juries. This unacceptable risk arises in two separate ways.

"In a capital sentencing proceeding before a jury, the jury is called upon to make a 'highly subjective, "unique, individualized judgment regarding the punishment that a particular person deserves."'" Turner, 90 L.Ed.2d at 35 (quoting Caldwell v. Mississippi, 472 U.S. ___, 86 L.Ed.2d 231, 247 n. 7 (1985), and

Zant v. Stephens, 462 U.S. 862, 900 (1983)(Rehnquist, J., concurring)). Because "[i]t is entirely fitting for the moral, factual, and legal judgment of judges and juries to play a meaningful role in sentencing..., sentencers will exercise their discretion in their own way and to the best of their ability." Barclay v. Florida, 463 U.S. 939, 950(1983)(plurality opinion). "The sentencing process assumes that the trier of fact will exercise judgment in light of his or her background, experiences, and values." Id. at 970 (Stevens and Powell, JJ., concurring).

Given the inherently subjective, value-laden nature of the capital sentencing determination, there is risk of substantial inaccuracy and unreliability in the death verdict imposed or recommended by a jury from which minorities were purged. This risk arises in two ways. First, "[b]ecause of the range of discretion entrusted to a

jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." Turner, 90 L.Ed.2d at 35. The impermissible removal of black potential jurors from the jury room removes one of the best -- if not the best -- means of curbing such abuse: The presence of a black juror provides both a means to unmask prejudice should it creep into the jury room and a powerful deterrent against its entry.

Second, the very function of a jury in a capital case is to serve as a "link between contemporary community values and the penal system -- a link without which the determination of punishment could hardly reflect the 'evolving standards of decency that mark the progress of a maturing society.'" Gregg v. Georgia, 428 U.S. 153, 190 (1976) (plurality opinion)(quoting Trop v. Dulles, 356 U.S.

86, 101 (1958)). That link is destroyed when important segments of the community are deliberately and impermissibly excluded. All the reasons that demonstrate that the exclusion of blacks from the guilt/innocence stage of the trial affects the decision-making process apply with greater force to the sentencing decision, which more openly calls for the exercise of discretion and the interpolation of values in the application of the law.

The Court recognized as much in Witherspoon v. Illinois, 391 U.S. 510 (1968) -- concerning the exclusion of individual jurors because of their values regarding capital punishment -- where it held that decision entirely retroactive. Id. at 523 n. 22. See also Davis v. Georgia, 429 U.S. 122 (1976) (improper exclusion of single Witherspoon juror requires reversal). So too, in capital cases in which the prosecution used its

peremptories impermissibly to remove blacks --and to a much greater degree -- "the jury selection standards employed ... necessarily undermined 'the very integrity of the ... process' that decided the petitioner's fate ... requiring the fully retroactive application of..."[13] Batson to capital sentencing proceedings.

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[13] Witherspoon, 391 U.S. at 523 n. 22 (quoting Linkletter, 381 U.S. at 639).

CONCLUSION

For the foregoing reasons, the judgments of the courts below should be reversed.

Respectfully submitted,

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